IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1289

THE CALIFORNIA COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

REPLY TO BRIEFS OF FEDERAL POWER COMMISSION IN OPPOSITION AND MOBIL OIL CORPORATION IN OPPOSITION

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In its petition for a writ of certiorari, The California Company presented a single important issue which, we respectfully submit, should not be submerged in the numerous questions urged in the five other petitions for

certiorari filed in these proceedings.[1] Nothing in the brief of the Solicitor General for the Federal Power Commission, or in the only other brief in opposition, by Mobil Oil Corporation,[2] supports the decision of the court below on this issue or answers our showing that the issue is an important one, decided in a way in conflict with applicable decisions by this Court.

In July 1971, the Commission fixed "rate levels for refund purposes" for all gas *delivered prior to August 1, 1971,* and provided that refunds calculated on the basis of these "rate levels" could be discharged (1) by payment in cash, with interest, or (2) by "working-off" these refund obligations, in whole or in part, by dedicating new gas to the interstate market. In its instant order the Commission found that an increased price of gas for future sales was just and reasonable, but provided that any producer owing refunds could not collect the new rate unless it waived the "work-off" provisions of the 1971 refund order. The producer owing refunds is thus given the "option" of charging the old rate and receiving refund credits, or of charging the rate now found to be reasonable, but only on condition that he waive refund credits. This is no "option" at all, since the old rate is 27 cents and the refund credit one cent, whereas the new rate is 50 cents. The effect of the order is simply to wipe out, retroactively, the refund "work-off" provisions which were part of the rate structure of the old order applicable to sales of gas prior to August 1, 1971.

[1] Nos. 75-1299, 75-1304, 75-1305, 75-1308, 75-1474.

[2] The brief of Mobil Oil Corporation makes the same argument as the brief for the Commission (pp. 18-20.) We shall reply to both briefs by reference to the Commission's brief.

In our petition, we pointed out (Pet., p. 7):

> "The situation is no different than if the Commission had fixed the just and reasonable rate for all future gas deliveries and then held that, on reconsideration, it believed it had fixed refunds in its previous order for gas sold prior to 1971 at too low a rate; that, therefore, producers owing refunds on past sales could not charge the just and reasonable rate on future sales until they had paid $150 million more in refunds than the Commission had previously ordered."

The argument on this point in the brief of the Federal Power Commission is in two paragraphs, at pages 16-18 of its brief. It argues, first, that

> ". . . the Commission did not retroactively modify those orders. To the contrary, the incentive features of those orders are still operative. Each producer has a choice. He may sell his gas under the national rate structure without refund discharges***or he may continue to sell at the rates prescribed in the area rate orders and avail himself of the refund discharge***provisions of those orders. In other words, the Commission has done nothing more than provide producers with a new alternative rate system***" (Brf., p. 17).

In support of this argument, the Commission cites *Moss v. Federal Power Commission* (D.C. Cir. 1974) 502 F.2d 461 (reversed on other grounds, March 3, 1976, 96 S.Ct. 1003).

But the *Moss* case involved an optional rate procedure which was a *viable* alternative to area rates. The Commission described this procedure as follows:

> "It should be made clear that the optional procedure is not intended to supersede the

procedures currently being followed in the area rate proceedings. The area rate opinions have established rate levels for new and flowing gas sales that are currently being made, and parties may continue to operate under these procedures. This is an alternative procedure which is available if the producer is willing to forego certain benefits of area rate proceedings, in exchange for certainty of its certificated price, as determined at the certificate stage" (Order 455, 48 F.P.C. (1972) 218, 224).

In the instant case, no viable choice exists. The national rate of 50 cents, with escalations, is now the only just and reasonable rate. The old area rate of 27 cents is not just and reasonable; it barely exceeds one-half of what the Commission has now found to be the cost of production. It does not remain in force as a general rate structure to provide a viable alternative to producers. Instead, it is held out only as an attempted justification for forcing producers to forego the right to work-off their refund obligations on past sales.

As stated by the Court of Appeals for the District of Columbia in a case involving an election under the tax laws:

> "An election by compulsion or without freedom of choice is, as it is sometimes called, 'Hobson's choice,' which Webster (1931) defines as a choice without an alternative" (*Pictorial Review Co. v. Helvering* (D.C. Cir. 1934) 68 F.2d 766, 769).

The Commission argues, second, that the refund provisions "were designed to operate in conjunction with the prescribed *area* rate levels" (Comm. Brf., p. 17). The exact opposite is true. As this Court pointed out in the *Mobil* case, the refund discharge provisions were an integral part of the "1961-1971 rate

structure," not the rate structure for sales after August 1, 1971 (417 U.S., at pp. 299-300). Had refunds been based on the "area rate levels" established for future sales, they would have been less than the $150 million refund figure actually ordered (417 U.S., at p. 299).[3]

The refund order was the result of a settlement. The settlement figure, linked with the work-off provision, represented a compromise designed to end disputes over refund amounts for gas already sold and delivered. The Commission would now retroactively change that settlement to require producers to settle their refunds in cash rather than by dedicating new gas reserves.

Finally, throughout its argument, the Commission persists, as did the Court below, in treating the refund "work-off" provision as being in the same category as

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[3] The Fifth Circuit, in its opinion affirmed by this Court in *Mobil*, described the refund order as follows:

> "The short answer to the contention of some of the consumers that the refund scheme is not supported by the evidence is that the stipulated refund amounts are more beneficial to their particular interests than would be a refund order based on the 'just and reasonable' rate established for flowing gas by Op: 598. The flowing gas rate sanctioned by Op: 598 is 22.375¢/Mcf (onshore) or 21.375¢/Mcf (offshore). The stipulated refunds for first vintage gas, however, provided for a refund of amounts in excess of 20.625¢/Mcf (onshore) or 19.625¢/Mcf (offshore) for the pre-1965 period and 21.25¢/Mcf (onshore) or 20.25¢/Mcf (offshore) for the period from January 1, 1965 to September 30, 1968. If the refunds had been calculated on the basis of the rates established for flowing gas and approved by us in this Opinion, they would have been substantially *less* than the $150,000,000 about which some consumers complain" (*Placid Oil Company v. Federal Power Commission* (5 Cir. 1973) 483 F.2d 880, 904-905).

the contingent rate escalations. This is clear error. The "work-off" provision was a part of the rate structure *for past sales.* The order also provided for certain contingent escalations in price *for future sales,* to become effective if and when the industry had dedicated specified amounts of gas to the interstate market.[4] Obviously, the Commission in its new order could provide a rate *for future sales* which increased the base price and eliminated these contingent escalations. Just as obviously, however, it could not retroactively change the rate structure for sales made prior to 1971. Nor, as pointed out above, could it do this indirectly by attempting to force a Hobson's choice upon the producers.

CONCLUSION

For the reasons stated above and in our petition for a writ of certiorari, we respectfully submit that a writ of certiorari should be granted in this case, limited to the question raised in this petition.

Respectfully submitted,

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[4]Seven and one-half trillion cubic feet would escalate the price 0.5 cents; 11-¼ Tcf, an additional 0.5 cents; 15 Tcf, an additional 0.5 cents (see *Mobil Oil Corporation v. Federal Power Commission* (1974) 417 U.S. 283, 298-299).